EXHIBIT A

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 03-01-02 PETITION OF GEMINI NETWORKS CT, INC. FOR A DECLARATORY RULING REGARDING THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED NETWORK ELEMENTS

December 17, 2003

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

Gemini Networks CT, Inc. (Gemini) has requested by Petition dated January 2, 2003 (Petition) that the Department of Public Utility Control (Department) issue a Declaratory Ruling finding that certain hybrid fiber coaxial facilities (HFC) owned by the Southern New England Telephone Company (Telco or Company) be deemed unbundled network elements (UNE) and be offered on an element by element basis to Gemini at total service long run incremental cost (TSLRIC) pricing. The Office of Consumer Counsel (OCC) and the Office of the Attorney General (AG) support the Petition. The Telco opposes the Petition in that it argues, inter alia, that the HFC facilities in question are not subject to unbundling.

In this Decision, the Department has determined that the HFC facilities in question are subject to unbundling. The Department also concludes that in order for Gemini to gain access to the HFC network UNEs, it must negotiate and enter into an interconnection agreement with the Telco pursuant to §§ 251 and 252 of the Telecommunications Act of 1996 (Telcom Act).

B. BACKGROUND OF THE PROCEEDING

By Petition received on January 2, 2003, Gemini[1] requested that the Department issue a declaratory ruling finding that certain hybrid fiber coaxial facilities owned by the Telco, formerly leased to SNET Personal Vision, Inc. (SPV), constitute UNEs and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service long run incremental cost pricing. Should the Department determine that those facilities are UNEs subject to appropriate unbundling and pricing, Gemini also requested that the Department initiate a cost of service proceeding to determine the appropriate pricing structure for the elements, based on TSLRIC. Gemini further requested the Department direct the Telco to file an inventory of all plant formerly leased to SPV, including the condition of all such plant and the disposition of any plant no longer in place.[2]

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[1] Gemini was awarded its Certificate of Public Convenience and Necessity (CPCN) to offer wholesale Internet Access service to three Connecticut towns by the Department's Decision dated September 1, 1999 in Docket No 99-03-12, <u>Application of Gemini Networks, Inc. for a Certificate of Public Convenience and Necessity</u>. In the Decision dated January 17, 2001 in Docket No. 00-10-20, <u>Application of Gemini Networks, Inc to Expand its Certificate of Public Convenience and Necessity</u>, Gemini was also granted facilities-based authority to provide wholesale telecommunications services throughout Connecticut Additionally, by the Decision dated September 28, 2001 in Docket No. 01-06-22, <u>Application of Gemini Networks, CT, Inc To Expand its Certificate of Public Convenience and Necessity</u>, Gemini was authorized to provide retail facilities-based and resold local exchange telecommunications services throughout Connecticut

[2] Petition, p. 1

In response to the Petition, the Telco requested that this proceeding be bifurcated.[3] Specifically, the Telco requested that the first phase of this proceeding address the legal issues. The Telco stated that should the Department find in Gemini's favor on the legal issues in the first phase of the proceeding, then a second phase could be initiated to address Gemini's other requested relief. The Telco also proposed that the Petition be stayed pending the Federal Communications Commission's (FCC or Commission) decision in its Triennial Review Proceeding.[4]

In its February 10, 2003 response to the Telco Request, the Department concluded that the Petition was seeking a determination as to whether the HFC network was subject to unbundling pursuant to the General Statutes of Connecticut (Conn. Gen. Stat.) §16-247b(a). The Department also concluded that before these network facilities could be subject to arbitration (as provided for by §252 of the Telcom Act), a determination must first be made that the HFC facilities may be unbundled pursuant to Conn. Gen. Stat. §16-247b(a). Accordingly, the Department denied the Telco's request to dismiss the Petition. The Department also denied the Telco's request to stay its investigation pending the FCC's ruling in its Triennial Review Proceeding. Finally, the Department concluded that the Telco's proposal to bifurcate this proceeding into two phases with only the legal issues being addressed in phase one and addressing Gemini's request for a cost study and inventory in phase two, was of merit and established a procedural schedule to develop a record on which this Decision is based.

C. CONDUCT OF THE PROCEEDING

By Notice of Hearing dated March 10, 2003, and by Notice of Rescheduled Hearings dated May 29, 2003, the Department announced that hearings would be held on June 23, 2003 and June 24, 2003, at the Department's offices, Ten Franklin Square New Britain, Connecticut 06051. By Notice of Close of Hearing dated August 6, 2003, those hearings were cancelled.

On August 21, 2003, the FCC issued its order in Triennial Review Proceeding (TRO). In light of that order, the Department reopened the record of this proceeding and requested written comments and reply comments discussing the weight, if any, the TRO[5] should be given by the Department as it addressed the Petition.[6]

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[3] Telco January 23, 2003 Letter to the Department (Telco Request), p. 1.

[4] See CC Docket No. 01-339, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (Triennial Review Proceeding).

[5] The TRO achieved three primary goals First it continues the Commission's implementation and enforcement of the Telcom Act's market-opening requirements by applying the experience the FCC has gained implementing that act Second, the TRO applies unbundling as Congress intended: with a recognition of the market barriers faced by new entrants as well as the societal costs of unbundling. Third, the TRO established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers. TRO, ¶5 The FCC also states that the framework set forth in the TRO recognizes that this competition is taking place on an intermodal basis -- between wireline providers and providers of services on other platforms such as cable and wireless – and on an intramodal basis among wireline providers with different business and operational plans Id

The Department issued its draft Decision in this docket on November 3, 2003. All parties were offered the opportunity to file written exceptions and present oral argument concerning the draft Decision.

D. PARTIES AND INTERVENORS

The Department recognized the Southern New England Telephone Company, 310 Orange Street, New Haven Connecticut 06510; SNET Personal Vision, 310 Orange Street, New Haven Connecticut 06510; Gemini Networks CT, Inc., c/o Murtha Cullina, LLP, CityPlace I, 185 Asylum Street, Hartford Connecticut 06103-3469; and the Office of the Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051, as parties to this proceeding. The Office of the Attorney General for the State of Connecticut and Cablevision Lightpath-CT, Inc. requested and were granted intervenor status to this proceeding.

II. PETITION

Gemini requested that the Department declare that certain Telco HFC facilities formerly leased to SPV constitute UNEs and as such, must be tariffed and offered on an element by element basis for lease to Gemini at TSLRIC pricing. Gemini also requested that in the event that these facilities are UNEs, that the Department immediately initiate a cost of service proceeding to determine the appropriate pricing structure, based on TSLRIC. Gemini further requested that the Department order the Telco to provide an inventory of all plant formerly leased to SPV including the condition of all such plant and the disposition of any plant no longer in place.[7]

Gemini claims that it has attempted to enter into negotiations with the Telco for lease of portions of the HFC facilities pursuant to state and federal law. Gemini also claims that the Telco refused to negotiate the lease of these facilities because the Telco did not consider these facilities as UNEs; and therefore, they were not subject to unbundling or regulation as unbundled network elements. Accordingly, Gemini requested the Department declare the HFC facilities to be UNEs so that it may re-enter negotiations with the Telco to obtain access to certain of the unbundled network elements pursuant to applicable pricing and regulations.[8]

In the opinion of Gemini, the Petition furthers the goals of Connecticut codified in Conn. Gen. Stat. §16-247(a) to promote the development of effective competition, facilitate the efficient development and deployment of an advanced telecommunications infrastructure and encourage the shared use of existing facilities. Gemini further submits that its request will benefit all parties, because it will promote competition to the benefit of consumers, assist Gemini in the rapid deployment of its network and services, and provide revenue to the Telco for currently unused portions of its network.[9]

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[6] See the August 25, 2003 Notice of Reopened Record and Request for Written Comments and Reply Comments (Reopen Notice)

[7] Petition, p 1

[8] Id.

[9] Id., p 2.

Therefore, Gemini requests that the Department (a) declare that the HFC network formerly leased by SPV is subject to unbundling and tariffing as UNEs pursuant to Conn. Gen. Stat. § 16-247b(a); (b) conduct an expedited cost of service proceeding to determine the rates at which these UNEs will be offered pursuant to Conn. Gen. Stat. § 16-247b(b); and (c) order the Telco to provide an immediate inventory of the remaining HFC plant, including the condition of such plant and an itemized list of any portions of the plant previously disposed of by the Company.[10]

III. POSITIONS OF PARTIES AND INTERVENORS

A. GEMINI NETWORKS CT, INC.

Gemini argues that it is seeking unbundled access to local loops owned and controlled by the Telco because state and federal law require that the local loop be unbundled.[11] In the opinion of Gemini, it is irrelevant what architecture an incumbent local exchange carrier (incumbent LEC or ILEC) employs in its local network and whether the loops are constructed with ratepayer or shareholder money. Gemini states that competitive local exchange carriers (CLEC) are entitled to nondiscriminatory, unbundled access to local loops and that the Department should direct the Telco to unbundle its HFC network and move to the pricing phase of this proceeding.[12]

Gemini notes that the FCC has maintained that under any reasonable interpretation of the "necessary" and "impair" standards of §251(d)(2) of the Telcom Act, loops are subject to unbundling obligations. According to Gemini, it has merely sought nondiscriminatory unbundled access to local loops. Gemini contends that the Telco's HFC network is nothing more than a local loop that must be unbundled.

Gemini cites to the FCC's regulations that require ILECs to provide nondiscriminatory access to the local loop and subloop, including inside wiring owned by the incumbent LEC, on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service. Therefore, the Telco is not relieved of its unbundling obligations because of the way in which it designed its HFC network. Irrespective of whether the loop is copper, HFC, or one that has been enhanced by fiber and utilizes a remote terminal, Gemini maintains that it is still a UNE loop, as defined by the FCC, and subject to unbundling. The intention of the FCC is to ensure that the definition of a loop will apply to new as well as current technologies, and to ensure that competitors will continue to be able to access loops as a UNE as long as that access is required pursuant to §251(d)(2) of the Telcom Act. Gemini also maintains that neither self-provisioning loops nor obtaining them from third-party sources is a sufficient substitute that would justify excluding them from the unbundling obligation under §251(c)(3) of the Telcom Act.

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[10] Id., p. 11

[11] The Telco maintains that if this matter is about unbundling the local loop, it should be dismissed as moot because the Department has previously established unbundled access and pricing for those UNEs Telco Reply Brief, p 7

[12] Gemini Brief, p 1.

Gemini also notes that the Department has concurred with the FCC's ruling that local loops must be unbundled and that such unbundling is critical to encouraging market entry, as well as its requirement that the Telco provide CLECs unbundled local loops.[13] Therefore, because the HFC network is comprised of local loops, it must be unbundled.[14] Additionally, Gemini contends that the Telco bears the burden of proving that unbundling the HFC network is technically infeasible in order to avoid its unbundling obligations.[15] In the opinion of Gemini, unbundling the HFC network must be deemed feasible and as a result, should form the basis for the Department's Decision in this matter.[16]

Gemini cites as an example, the Department's authority pursuant to 47 U.S.C. § 251(d)(3) and 47 C.F.R. § 51.317 to unbundle the HFC network. In the opinion of Gemini, the plain language of the Telcom Act and the FCC's implementing orders clearly authorize the Department to establish unbundling obligations, including unbundling the HFC network. The states' independent authority to order unbundling beyond the national list has been confirmed by the courts. Additionally, the Department has recognized its own independent state authority to rebundle network elements even after the Eighth Circuit Court of Appeals removed all requirements under the Telcom Act for an ILEC to offer such rebundled elements under federal law.[17]

Relative to state law, Gemini contends that the Department has ample authority to unbundle the HFC network. According to Gemini, Conn. Gen. Stat. §16-247b(a), confers on the Department a wide spectrum of powers to unbundle any portion of the Telco's network amenable to unbundling, including the HFC network. Gemini contends that the only qualification on the unbundling of the Telco's local network is that the network element be "used" to provide telecommunications service.

Gemini notes that the Department has additional, slightly more restrictive unbundling authority under Conn. Gen. Stat. §16-247b(b) because it requires the network element to be "necessary" to the provision of telecommunications services. Gemini states that there is no limiting language in Conn. Gen. Stat. §§16-247b(a) and 16-247b(b) that would prohibit the Department from unbundling any portion of the Telco's network based on the type of architecture used or the capabilities of the network

[13] See the May 5, 1999 Decision in Docket No 98-11-10, Application of ACI Corporation for an Advisory Ruling on The Southern New England Telephone Company's Provision of Unbundled Loops to Competitive Local Exchange Carriers, p 11.

[14] According to the Telco, the coaxial distribution facilities cannot be network elements because they are not a facility or function used in the provision of a telecommunications service as required by the Telcom Act and state statute. The Telco states that those facilities are not part of, or connected to the telecommunications network. Nor are they a loop because they are not connected to the Telco's distribution frame or its equivalent in the central office and are not connected to the telecommunications demarcation point at the end user location Telco Reply Brief, pp 4 and 5.

[15] According to the Telco, Gemini's contention is misplaced and premature Based on the Department's bifurcation of this proceeding, the central issue in this phase of the proceeding is whether the Telco's coaxial distribution facilities are subject to federal and state unbundling rules Id , p 7

[16] Gemini Brief, pp 6-10.

[17] Id , pp 10-16. The Telco states that Gemini ignores the fact that the Supreme Court vacated all of the FCC's unbundling rules in its own Iowa Utilities decision as did the D C. Circuit Court in United States Telecom Association, et al., v Federal Communications Commission (USTA). According to the Telco, under the Hobbs Act, the USTA decision is the law of the land Telco Reply Brief, p 12

for the provision of advanced services. Gemini argues that it is immaterial that the network was constructed as an HFC network or previously utilized to transport video signals. The only relevant inquiry is whether the network is capable of being used for telecommunications services.

Gemini also notes that Conn. Gen. Stat. §16-247f(a) obligates the Department to regulate telecommunications services in a manner that is designed to foster competition and protect the public interest. That statute also reflects the remedial nature of the whole body of law governing the provision of telecommunications services in Connecticut. Additionally, Gemini claims that the intent of the legislature is to foster competition, protect the public interest and promote the shared use of existing facilities. In the opinion of Gemini, the unbundling of the Telco's HFC network pursuant to the Conn. Gen. Stat. §16-247b(a) achieves the General Assembly's goals, especially because it involves the use of an already existing, dormant network.

Gemini asserts that state commissions have the right to order unbundling of ILEC network functions and features that go beyond the national list of UNEs, as long as they are consistent with federal law. The Connecticut statutes providing for telecommunications competition share the same goals as the Telcom Act and are consistent with that act. In the opinion of Gemini, the full objectives of the Telcom Act are designed to embrace state law by meeting local needs with federal guidance. The Connecticut Supreme Court has also recognized the Department's jurisdiction to regulate pursuant to the provisions of state law despite the presence of the Telcom Act.[18]

Further, Gemini disagrees with the Telco that the Department has no jurisdiction over the coaxial distribution facilities because they were not used to provide telecommunications services and, therefore, not subject to unbundling. Gemini argues that the evidence demonstrates that the HFC network was in fact used for telecommunications services and is capable of such use. According to Gemini, the HFC network need only be capable of providing one telecommunications service in any manner by which a CLEC seeks to provide such service.

Gemini contends that the purpose of the Telco's I-SNET Technology Plan (I-SNET) was to provide a full suite of voice, data and video services. The goal of which was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. I-SNET was also intended to supersede the Company's existing infrastructure in that it included the total migration of the interoffice transport network to a SONET-based digital broadband platform and retirement of the existing embedded base of copper cable, circuit switching, computing and associated common and complementary assets.

While noting that SPV was granted a statewide cable television (CATV) franchise to provide video services over the I-SNET network, Gemini states that SPV leased network capacity from the Telco for purposes of deploying cable television services. SPV was also responsible for certain direct costs relating to video and 50% of the HFC

[18] Gemini Brief, pp 16-19

network costs. Gemini maintains that the basis for this cost-sharing arrangement was the prospect that each home passed by the HFC network would subscribe to Telco telephone service and SPV cable service. Gemini also contends that the HFC network was planned and designed to serve voice customers and to provide transport for video services, in effect, to be used as the Telco's local exchange network. Therefore, Gemini disagrees with the Telco's claim that the HFC network is not capable of use for telecommunications services and suggests that the Department review the Company's telephony trial logs and make its own determination as to the capability of that network.

Gemini also argues that the Telco's focus on its use of the network is misplaced because the courts have consistently held that it is not the use of the facilities that is relevant in any inquiry, but the capability. Gemini cites to the Fourth Circuit Court of Appeals (Fourth Circuit), wherein Bell Atlantic claimed that its equipment must be in actual use, and not capable of being used in order to qualify as a network element. Gemini claims that the Fourth Circuit rejected this argument and held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" is broadly defined. Gemini applies the same analogy in the instant case and contends that the HFC network does not become "used in the provision of telecommunications service" only when someone starts to communicate over the network.

Additionally, Gemini cites to the FCC wherein it analyzed the issue of whether an element must be "used" in the strict sense in order to be subject to unbundling. Gemini claims that the FCC reviewed this issue in the context of dark fiber and that the Commission found that an element is subject to unbundling if it is already installed and easily called into service, similar to the unused capacity of other network elements. The FCC also found that unused transport capacity, such as that of the HFC network, is a feature, function and capability of a facility qualifying as used to provide telecommunications services.

Gemini notes that it is not required to provide the full suite of telecommunications services that the Telco is required to provide. To the extent that the HFC network is not capable of supporting some services, Gemini argues is irrelevant to any determination in this proceeding. The Telco is required to unbundle the network and allow nondiscriminatory access to provide only those services which Gemini seeks to provide. In the opinion of Gemini, the services that it seeks to provide are capable of being delivered over the HFC network, as evidenced by the Telco's service trial logs, by Gemini's provision of such services over its HFC network and by other companies offering of services over HFC networks in different parts of the country.[19]

Further, since the HFC network is a local loop, Gemini maintains that it is presumptively impaired by being denied access to the network. Whether the Department can unbundle additional elements beyond the national list is not subject to legitimate dispute; rather, the only question is what standard applies to the unbundling analysis. While acknowledging that the USTA decision is on appeal, Gemini argues that the Department is in no way prevented from ordering the Telco's HFC network to be unbundled. According to Gemini, the D.C. Circuit Court addressed only the FCC's

[19] Id., pp 19-25

interpretation of the "impair" standard, and did not limit the ability of the states to utilize their authority to adopt state-specific unbundling requirements under the Telcom Act. Gemini states that the Department need only ensure that its unbundling regime fulfills the pro-competitive purposes of the Telcom Act.

Gemini cites to 47 C.F.R. § 51.317, which it contends provides for unbundling of a proprietary element if access to the element is "necessary," and access to a non-proprietary element if lack of access to that element would "impair" the new entrant's ability to provide the service it seeks to offer. Because the FCC has concluded that the "necessary" standard applies only to proprietary network elements, it does not apply to the HFC network because loops are, in general, not proprietary in nature. Gemini asserts that the Telco's HFC network is no different than that currently being employed by Gemini, incumbent cable companies or other broadband service providers. Moreover, Gemini argues that the Telco cannot claim a proprietary interest in the HFC network because it has been abandoned and has no commercial value.

Relative to the impair standard, while noting that this issue has been remanded by the D.C. Circuit Court, Gemini argues that the associated impairment factors are not relevant to unbundling the HFC network and those that do, favor its unbundling. Gemini also argues that there is no dispute that competitors are unable to economically duplicate the Telco's HFC network in those portions of Connecticut in which it exists. In promulgating the Telcom Act, it was Congress' expectation that new competitors could use ILEC UNEs until it was practical and economically feasible for them to construct their own networks. Gemini maintains that it is impaired without unbundled access to the HFC network and such impairment reaches all customers that can be served by that network.

Gemini further maintains that material cost disadvantages favor unbundling. While noting that the D.C. Circuit Court discussed whether a cost disadvantage is "material" if it is a typical cost shared by any new entrant in an industry, Gemini suggests that the Department distinguish between typical costs a new entrant faces in any industry compared to those experienced by CLECs. Such a comparison would examine the impact of the Telco's existing HFC network, which new entrants cannot duplicate without possessing a massive customer base. Gemini claims that the FCC recognized such sunken costs are a substantial barrier to market entry and that similar barriers to entry such as securing pole licenses are under the predominant control of the Telco. Therefore, the enormous cost disadvantages faced by CLECs are not typical of new entrants in other common industries.

Moreover, Gemini asserts that the very existence of the Telco's HFC network represents a barrier to entry completely within the control of the Company because it is occupying the last useable space on the poles. Gemini states that in order for it to construct its own HFC network, the Telco would either have to remove its HFC network or replace the existing poles with taller poles and move the existing facilities to another pole. In either case, Gemini claims that it would incur charges for the necessary make-ready work This is cost-prohibitive and would be a waste of deployed communications assets which is contrary to the goals of the Conn. Gen. Stat. §16-247a.

Gemini also notes that the D.C. Circuit Court has required the FCC to consider the entire competitive context in making an unbundling determination. According to Gemini, unbundling of the Telco's HFC network is consistent with the competitive goals of state statutes and the Telcom Act. In addition to encouraging Gemini's investment in its own facilities, unbundling of the HFC network would allow Gemini to build a customer base from which it could raise capital to expand its own network.

Unbundling of the HFC network is also the best way to reduce the market power that the Telco and incumbent cable companies currently exercise in the provision of broadband services. Gemini suggests that the large economies of scale in wireline and cable networks and significant costs of expansion will prevent most competitors from entering the broadband market and by requiring the Telco to unbundle its existing HFC network, competitive carriers will be permitted to enter the market.

Gemini also maintains that unbundling of the HFC network will afford CLECs the opportunity to provide broadband service to those customers that cannot be reached through the Telco's existing copper network. Unbundling of the HFC network would also afford these providers an opportunity to combine leased HFC network components with their own facilities to deliver a combination of voice and advanced services. This ability to offer these services is critical to any hope for sustained meaningful competition in voice services, especially at the residential level.

Gemini notes that neither the D.C. Circuit Court nor the Supreme Court adopted the "essential facilities doctrine" of antitrust law. In the opinion of Gemini, unbundling of the HFC network comes close to meeting the essential facilities doctrine. While disagreeing with the Telco argument that alternatives exist for Gemini's provision of services, it claims that such alternatives are not viable, concrete, nor do they permit the offering of comparable services.

Moreover, Gemini argues that use of the Telco's copper-only network merely provides Gemini with a service-delivery option that the Company is spending billions of dollars to avoid. Rather than use its own existing copper network for the provision of advanced services, Gemini notes that the Telco is deploying Project Pronto. The FCC has refused to recognize an ILEC's existing services as a substitute for access to unbundled network elements. According to Gemini, if the Telco is successful in requiring Gemini to utilize existing services and other portions of the Company's copper network, it would force Gemini to abandon its facilities-based business plan and effectively lose its ability to compete. Gemini is adamant that the Telco's existing copper network does not provide the kind of complete end-to-end connectivity that Gemini requires as part of its business plan. Nor is there any presumption under federal and state law that competitors will not construct duplicative networks. Gemini contends that its technical plan requires an HFC architecture which is faster and provides more consistent speeds for data transmission over the entire geographic reach of its network. In lieu of access to the HFC network, the Telco would impose an architecture on it that is a technologically inferior copper twisted pair. Gemini claims that the Telco cannot dictate the technology, method or parameters by which a CLEC offers service.[20]

[20] See the May 5, 1999 Decision in Docket No 98-11-10.

Gemini commits to continuing constructing additional portions of its HFC network and that the interconnection of its existing network with the Telco's (not with the Company's twisted pair copper loop network), will provide the interoperability and open networks envisioned by the Connecticut statutes. Gemini asserts that options for CLECs to replicate networks in lieu of gaining unbundled access have consistently been rejected. Gemini argues that requiring CLECs to invest in duplicative facilities would delay market entry and postpone benefits to consumers and is an economic barrier to entry that has been rejected by the FCC and the Supreme Court. Gemini also asserts that it would be cost-prohibitive to construct a duplicate network in those areas where the Telco's network currently exists and would amount to a waste of resources.[21]

Relative to the TRO, Gemini states that the FCC explicitly confirmed the Department's right to unbundle the HFC network pursuant to state law. The FCC has also reaffirmed its interpretation of 47 U.S.C. § 251(d)(3) as preserving state authority to unbundle, as long as it does not conflict with the Telcom Act. Gemini also states that the FCC also rejected the ILECs' arguments that the states are preempted from making unbundling determinations and that the Telco has previously recognized the Department's authority to unbundle pursuant to state law.[22]

Additionally, Gemini claims that the FCC addressed the issue surrounding the definition of network element and whether such elements must be used vs. merely capable of being used. In the opinion of Gemini, the FCC has required that network elements that are capable of being used to provide telecommunications services must be unbundled, irrespective of whether they are used for telecommunications services.[23]

Gemini also contends that the FCC has reaffirmed that a carrier is impaired when lack of access to an ILEC's network elements poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. According to Gemini, the TRO establishes the barriers to entry that must be considered in any impairment analysis: scale economies, sunken costs, first-mover advantages, absolute cost advantages, and barriers within the control of the incumbent LEC. In applying the impairment test, the Department must determine whether the sum of the barriers is likely to make market entry uneconomic, taking into account any countervailing advantages that a CLEC might have.

In the TRO, the FCC has also determined that actual marketplace evidence is the most persuasive and useful to any impairment analysis. Accordingly, Gemini suggests that the Department evaluate the extent to which competitors are providing retail services in the relevant market using non-incumbent LEC facilities and the deployment of intermodal technologies. Gemini also suggests that the Department is in the best position to perform the necessary "granular" analysis concerning customer classes, geography and relevant services.

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[21] Gemini Brief, pp. 25-37.

[22] Gemini September 12, 2003 Comments, pp 3 and 4

[23] Id., pp 4 and 5

Gemini states that an in-depth review of those factors demonstrates that it is impaired by denial of access to the HFC network. Moreover, the TRO requires the Department to consider that Gemini is seeking access to the Telco's HFC loop facilities to provide basic voice-grade telephony services to mass market customers. Gemini claims that the FCC has concluded that facilities capable of providing such mass market voice-grade services are to be afforded the maximum unbundling, because that market is the most competitively underserved. Gemini asserts that the greatest impairment factor associated with serving the mass market is the necessary duplication of mass market loop facilities absent any guaranteed return on the investment. According to Gemini, the Telco had its own mass market captive customer base and regulated rates to fund the costs of construction of the HFC network.

Gemini further argues that the Telco has enjoyed the advantages of a first-mover as the incumbent LEC, which it extended to SPV. Gemini cites as an example the Telco not having to wait to secure pole licenses or pay for the shifting of its facilities from one utility pole to another. Finally, Gemini claims that the Telco enjoyed its existing pool of skilled labor and back office services in constructing that network. Moreover, Gemini claims that the FCC has recognized the impairment caused by Gemini and other competitors would experience in attempting to overcome the Telco's well-established brand name in order to convince reluctant mass market customers to switch their basic telephone service.

Gemini also claims that the FCC believed it was necessary to weigh other considerations that factor into the incentive to deploy advanced networks. These include the incentive to invest in next-generation architecture and the upgrading of existing loop plant, and the existence of intermodal competition. Due to the unique facts of this particular situation, Gemini notes that those "other considerations" weigh in its favor of unbundling the unique HFC network. The case for not unbundling local loop facilities rests on the resulting incentive for the ILEC to continue deployment of advanced facilities which does not exist here because the Telco has abandoned the HFC network. In order to "unleash the full potential" of the HFC network, it must be unbundled in order for Gemini to invest in the infrastructure and provide more innovative products and services to Connecticut consumers.[24]

Gemini argues that unbundling of the HFC network is consistent with the Telcom Act and promotes the FCC's goals and spurs investment in next-generation networks for the provision of advanced services to consumers. Gemini is seeking unbundling of the HFC network for the provision of voice-grade telephony services which are "qualifying services" for which network elements must be unbundled. Nevertheless, once the HFC network is unbundled and used for the provision of qualifying services, Gemini plans to provide advanced services to Connecticut consumers, including non-qualifying services and information services. Gemini claims that this is encouraged by the FCC in order to maximize the use of facilities and not waste a network element by refusing to allow it to be put to its maximum use.[25]

[24] Id., pp. 5-10

[25] Id., pp. 10 and 11

Gemini also maintains that the TRO deals extensively with the subject of unbundling of local loops focusing on the unbundling of traditional network architectures and loops including traditional copper loops, fiber-to-the home (FTTH) and hybrid copper/fiber loops. In the opinion of Gemini, the TRO does not specifically address the unbundling of the HFC loop even though the FCC recognizes HFC as a form of local loop.

Moreover, Gemini claims that the FCC sought to achieve three main goals through its triennial review. In particular, the FCC sought to: (1) implement and enforce the Telcom Act's market-opening requirements; (2) apply unbundling with a recognition of the barriers faced by competitive entrants as well as the societal costs of unbundling; and (3) establish a regulatory foundation that creates an incentive for investment in advanced telecommunications infrastructure by both ILECs and competitive providers. Gemini asserts that the unbundling of the Telco's HFC network will satisfy these goals.[26]

Finally, Gemini states that if the FCC had addressed the HFC network in the TRO, it would likely have performed an impairment analysis similar to the one it performed for hybrid copper/fiber loops. Pursuant to this type of analysis, Gemini is entitled to the unbundling of the HFC network. Gemini contends that in reviewing whether to unbundle hybrid loops, the FCC evaluated three primary factors in an attempt to craft a balanced approach to determine the most appropriate unbundling regime for hybrid loops. These factors are the costs of unbundling, specifically focusing on whether refraining from unbundling hybrid loops would stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure; the effect of alternatives to mandating unbundled access to hybrid loops; and the state of intermodal competition.

Gemini claims that the first factor weighs in its favor because refusing to unbundle the HFC network would not cause investment in that network by the Telco. Since the Telco has already abandoned the HFC network, the only way to stimulate investment in that network is to unbundle it and allow Gemini to upgrade the infrastructure. Gemini also claims that the third factor supports the Petition because there are no competitive providers of voice-grade telephony serving mass market customers in Connecticut.

Relative to the effect of alternatives to mandating unbundled access to the loop, Gemini asserts that these factors would vary based on whether a competitive provider was seeking access for the provision of broadband or narrowband services. Gemini contends that the TRO requires the Department to analyze the issue in this proceeding pursuant to the rules governing the provision of narrowband services, because it is seeking to provide narrowband voice-grade telephony services. In particular, the FCC has determined that for narrowband services, the Telco must provide access to portions of the hybrid loop. The Telco must also provide an entire non-packetized transmission path capable of voice-grade services between the central office and customer's premises Consequently, for hybrid loops, competitive providers are entitled to the non-fiber feeder portion of the loop plant, the non-fiber distribution portion of the loop plant, the attached digital line carrier system and any other attached electronics used to

[26] Id., pp 11-15

provide a voice-grade transmission path between the customer's premises and the central office. In the opinion of Gemini, it is entitled to similar unbundled features, functions and capabilities.[27]

B. THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

The Telco states that Gemini bears the burden to prove that the Company's coaxial distribution facilities are subject to unbundling. In order to make a determination of whether specific network elements need to be unbundled, the Telco contends that the Department must find that: (1) the subject facilities are part of the Company's network; (2) the facilities are used, or dormant but of the type normally used, by the Telco (not merely capable, as Gemini contends) to provide telecommunications to Company customers; (3) it is technically feasible to unbundle the specific network elements identified by Gemini; (4) the Telco could provide nondiscriminatory access to such requested elements; (5) the requested elements are necessary to Gemini's provision of telecommunications services; and (6) Gemini would be impaired in the provision of those telecommunications services without the specific network elements. Without sufficient evidence to establish each element, the Petition must fail.[28]

According to the Telco, the Department has no authority to compel unbundling beyond that required by the FCC and that the Department has no independent state authority to order the Company to unbundle new network elements, because the Telcom Act specifically provides only the FCC with that authority. The Telco also states that the Supreme Court has supported the Company's contention that the Telcom Act and its unbundling requirements and regulations are a federal matter beyond the jurisdiction of the individual states. In the opinion of the Telco, the fact that the FCC has not previously ordered coaxial distribution facilities be unbundled, preempts any state commission decision to require unbundling of those facilities.

The Company suggests that in the absence of express authority delegated by the FCC, the Department has no authority to grant the Petition. The FCC also lacks the power to delegate to state commissions the responsibility for determining which categories of network elements must be unbundled. The Telco also claims that there is nothing in the Telcom Act to suggest that the FCC can delegate the decision of what network elements should be made available because that act expressly directs only the FCC.

The Company contends that if the FCC were to "delegate" the unbundling authority to the states, it would undermine the national policy and unlawfully abdicate its responsibility to provide substance to the necessary and impair requirements. According to the Company, nothing within the Telcom Act or the FCC's specific pronouncements suggest that it intended to delegate that authority to the states.[29]

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[27] Id., pp 15-18

[28] Telco Brief, pp. 6 and 7.

[29] Gemini notes that absent from the Telco's Brief is any discussion of the large number of FCC and judicial decisions that have interpreted Section 251(d)(3) of the Telcom Act as confirming the right of state legislatures and regulators to unbundle network elements. To date, more than 19 state public utility commissions have interpreted that statute as conferring independent unbundling rights on

Therefore, the Department does not have any explicit or implicit delegated authority to pursue additional unbundling of Telco assets.

The Telco further states that even if Gemini were correct that the Department's authority to unbundle the HFC network did not derive from the Telcom Act, state statutes require the Department to act in a manner that is consistent with federal law. Moreover, the Connecticut Supreme Court specifically found that the Department's ability to order unbundling is limited by the Telcom Act. Therefore, the Telco cannot be compelled to unbundle its facilities in a manner that is different from federal law, particularly where Gemini demands that non-telecommunications facilities be unbundled.[30]

The Telco maintains that the Department cannot assert jurisdiction over its coaxial distribution facilities and order that they be unbundled because they are not part of the Company's network. The Telco disagrees with Gemini's reliance on Conn. Gen. Stat. §16-247b(a) as statutory authority because the Department may only unbundle a telephone company's network used to provide telecommunications. The Telco asserts that the coaxial distribution facilities are not part of the Company's network and that they were never used nor are they the type routinely used by the Telco to provide telecommunications services to the public. Because the coaxial distribution facilities are not useful for telecommunications, the Company has removed and continues to dispose of them as conditions dictate.

The Telco also asserts that it would take substantial investments in equipment and maintenance to make the existing coaxial distribution facilities a workable network and that the Department cannot compel the Company to reactivate and maintain a second network for Gemini's use.[31] Additionally, the Telco claims that the reason it abandoned HFC was because it could not economically support two networks. The Telco asserts that Gemini ignores the fact that no operational support systems (OSS) exist to support HFC for telephony. Specifically, there is no ordering, provisioning, maintenance, repair or billing system deployed to support Gemini's request for network elements on the coaxial distribution facilities. The Telco contends that all of these costs would have to be borne by Gemini. The Telco also states that it is not aware of any vendor that has developed such an OSS. Moreover, such a request is contrary to the holding in Iowa Utilities invalidating the FCC's "superior quality" rules, which had directed incumbent LECs, upon request, to provide CLECs with access to interconnection and UNEs at levels of quality superior to the levels the ILEC provided such services to itself. Therefore, if the coaxial distribution facilities are not part of the Company's network, they cannot be subject to federal or state unbundling rules.[32]

The Telco further maintains that its non-regulated facilities are not subject to the Department's jurisdiction. In the opinion of the Company, no provision in the Telcom

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states. According to Gemini, the actions of those states have been upheld by the courts. Gemini Reply Brief, p 2

[30] Telco Brief, pp 7-10

[31] Gemini disagrees, it has requested that it be allowed to exercise its rights pursuant to state and federal law to lease the HFC network at TSLRIC rates Gemini Reply Brief, p. 7

[32] Telco Brief, pp 10-12.

Act or state statutes provides the Department with jurisdiction to unbundle the Telco's non-telecommunications assets. The Company contends that when the Department granted SPV's application to relinquish its franchise, it expressly recognized the limits of its jurisdiction with respect to the Telco's assets. In citing Conn. Gen. Stat. §16-43, the Telco notes that the Department is permitted to review and approve Company initiated transactions and only if they involve property essential to its franchise or useful in the performance of its duty to the public. According to the Telco, it never used the coaxial distribution facilities to provide telecommunications services to its customers; and therefore, they cannot be considered essential to the Company's franchise.[33] Accordingly, the Department has no authority to compel the Telco to unbundle those portions of the HFC facilities that it previously recognized were not used to provide telecommunications, including those sought by Gemini.[34]

Additionally, the Telco maintains that the coaxial distribution facilities are not subject to unbundling because they cannot now, without substantial upgrades, be used to provide telecommunications. The Telco asserts that it never equipped any of its coaxial distribution facilities with equipment to permit the provision of telecommunications services to the public. In the opinion of the Company, the Telcom Act and Connecticut law support the Telco's position that the Department may only unbundle portions of the network that are used for telecommunications purposes. The requirement in §251(c)(3) of the Telcom Act to provide network elements is limited by the definition of network element as defined in §153(29) of the Telcom Act.[35]

The Company further claims that applicable federal and state statutes only authorize unbundling of its network and facilities used by the Telco to provide or provision telecommunications service to its customers; not, any facility that is capable of being used to provide telecommunications. According to the Telco, the FCC clarified this point in its Local Competition Order. Since the distribution facilities were not used by the Telco to provide its own telecommunications services, the Department lacks the authority to compel the Company or its shareholders to take any action.[36]

The Telco contends that while Phase I of this proceeding focuses on the legal issue of whether the coaxial distribution facilities must be unbundled, that is not the only legal issue which must be determined. The Company asserts that even if the coaxial distribution facilities are subject to Department jurisdiction, Section 251(d)(2) of the

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[33] Gemini argues that none of this is relevant because ratepayers funded the design and construction of the HFC network as an indivisible, fully integrated network to be used for both telecommunications and cable television purposes. Gemini also argues that it is not whether the HFC network is used and useful for ratemaking purposes, but whether the HFC network is capable of being used In the opinion of Gemini, the HFC network was built to serve both functions and now cannot be restricted to only one function for the Telco's convenience Gemini Reply Brief, p 3.

[34] Gemini argues that the fact that the Department has ordered an asset removed from a regulated utility's books does not mean that the utility can never utilize that asset again nor preclude addition of that asset back onto the utility's regulated books of circumstances change Id., p. 7

[35] Section 153(29) of the Telcom Act defines a network element as a facility for equipment used in the provision of telecommunication service The Telco notes that this definition was also adopted in Conn. Gen Stat. §16-247a(b)(7) and that Conn Gen Stat §16-247b(a) only permits the Department to unbundle Telco network elements that are used to provide telecommunications services Telco Brief, pp 10 and 11.

[36] Telco Brief, pp. 13-20

Telcom Act requires the consideration of whether the network element is necessary and whether the failure to allow access would impair Gemini's ability to provide the services it seeks to offer. The Telco claims that the FCC specifically held in 47 C.F.R. §51.317(d) that, the states must apply the standards set forth in 47 C.F.R. §51.317 as to whether the requested network element meets the necessary and impair requirements of §251(d)(2) of the Telcom Act. The Telco also states that the Connecticut Supreme Court specifically found that the Department's authority to order unbundling is limited by the requirements of §251(d)(3) of the Telcom Act. Therefore, regardless of whether federal or state law is implicated, Gemini is bound by the necessary and impair standard under either scenario.

In addition, the Company contends that Gemini deprived the Telco and the Department of the basic information necessary to conduct this inquiry. In particular, Gemini failed to demonstrate that access to the requested UNEs is necessary for it to provide telecommunications services or that it would be impaired in the provision of telecommunications services without such access. The Telco claims that the only information Gemini provided regarding its perceived impairment was its assertions about how its business plan was based on an HFC facilities' architecture and that its network cannot use the Company's copper-based network. The Telco also disagrees with Gemini's argument that if it were required to use the Company's existing network, Gemini would be forced to abandon its facilities-based business plan. According to the Telco, such an argument runs counter to current unbundling rules because they only require the Company to unbundle network elements from its existing telecommunications network. The rules do not require the Telco to modify its network or build or maintain additional facilities of a type not used or useful for the Telco's provision of its telecommunications services to meet the specific business plan of a given carrier.

Further, the Telco maintains that Gemini employs an efficiency argument in an effort to establish impairment that is irrelevant to the necessary and impair standard for several reasons. First, the Telco has existing UNEs throughout Connecticut that Gemini could purchase, obviating the need to build a duplicative network. Second, requiring the Telco to rebuild and maintain the duplicative coaxial network would simply shift the burden to the Company, rather than Gemini. Finally, Gemini was offered the option of purchasing the coaxial distribution facilities outright, which it declined.

Lastly, the Telco disagrees with the Gemini argument that more unbundling is generally good for competition and that the Company should unbundle its coaxial distribution facilities. The Telco notes that the Court of Appeals rejected this argument and an impairment analysis that turns on what the CLEC seeks to offer to the exclusion of what alternatives are already available. The Company also notes that the FCC has recently determined in the TRO that CLECs cannot meet the impair standard when seeking to unbundle overbuild broadband facilities where narrowband facilities remain available. According to the Telco, while the technologies may be different, the impairment analysis is the same for the Company's overbuild coaxial distribution facilities. Therefore, even if the coaxial distribution facilities were used by the Telco to provide telecommunications, the Company cannot be required to unbundle those facilities because there is no impairment, as long as the Telco continues to make UNEs available on the Company's copper network The Telco concludes that Gemini could never prove that its request to unbundle such facilities would meet the necessary and impair standard of §251(d)(2) of the Telcom Act because the Telco already provides access to its network and end users through existing UNEs.[37]

In its written comments filed in response to the Reopened Notice, the Telco contends that the FCC has explicitly rejected the impairment argument presented by Gemini in this proceeding as the D.C. Circuit had directed in USTA. According to the Telco, the FCC reasoned that such an approach could give some carriers access to elements but not to others and that a carrier or business plan-specific approach would be administratively unworkable. The Telco also states that the FCC concluded that it could not order unbundling merely because certain carriers with specific business plans could be impaired. Therefore, based on the TRO, the Telco concludes that Gemini's proposed approach to unbundling is inappropriate and, as a matter of law, cannot be employed to establish impairment.[38]

In response to Gemini's claim that this docket is about obtaining unbundled access to a local loop, the Company argues that the TRO specifically limits incumbents' local loop unbundling obligations for the deployment of broadband services to the existing copper-based legacy facilities. In particular, the FCC has required that ILECs only make available for the mass market, unbundled access to 2-wire and 4-wire analog voice-grade copper loops and subloops. In addition, the FCC found that ILECs need only provide unbundled access to local copper wire loops because they are only required to provide a complete copper-based transmission path between its central office and the customer premises. The Telco notes that while the FCC required ILECs to provide local copper loops conditioned for xDSL services, it also determined that they are no longer required to make available the HFPL as a UNE. That is, the FCC limited incumbents' unbundling obligations with respect to the deployment of broadband facilities, and the Telco's coaxial distribution facilities do not fall within the FCC's definition of a loop or subloop that is required to be unbundled.

The Telco also notes that the FCC declined to require ILECs to provide unbundled access to their hybrid loops for the provision of broadband services. The FCC also determined that ILECs were not required to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market, including any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Accordingly, the Telco is not required to make available unbundled access to the packetized bandwidth of hybrid loops for the deployment of broadband services because CLECs are not impaired in their ability to provide broadband services as long as the incumbent offers unbundled access to conditioned, stand-alone copper loops. Based on Gemini's request to unbundle the coaxial distribution facilities, it is the Telco's opinion that the FCC has precluded any finding of impairment. The Telco also claims that Gemini's arguments that the Telco should be required to provide unbundled access to such coaxial distribution facilities are in direct conflict with the FCC's reasoning within its TRO.

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[37] Id., pp. 20-24

[38] Telco September 12, 2003 Written Comments, pp. 4 and 5.

Regarding hybrid loops, the Telco states that the FCC found that an ILEC's only unbundling obligation was to provide unbundled access to a narrowband pathway capable of voice-grade service between the central office and the customer's premises using TDM technology. The FCC also found that the ILEC, at its option, could meet this unbundling obligation by making available unbundled access to a copper homerun. In the opinion of the Telco, the FCC reasoned that this was appropriate, because there is substantial intermodal competition for broadband services. Consequently, the Telco is not required to unbundle its coaxial distribution facilities as "loop" facilities because such a requirement would directly conflict with the FCC's findings and rationale.[39]

Moreover, the Telco maintains that the FCC further eroded the Petition by requiring that a CLEC may only access UNE(s) for the purpose of providing a qualifying service. Specifically, carriers requesting access to UNEs cannot qualify for UNEs if they only provide information services. For each UNE requested, the CLEC must provide a qualifying service on a common carrier basis. Relative to the Petition, the Telco asserts that Gemini's unbundling request must be rejected because it does not intend to use the coaxial distribution facilities to provide a qualifying service. According to the Telco, its coaxial distribution facilities do not support any qualifying telecommunications service without extensive retrofitting which is not required by the Telcom Act or the TRO, and therefore, they cannot be the subject of unbundling.[40]

Further, the Telco claims that the FCC made multiple factual findings in the TRO regarding the nature and extent of competition within the broadband market that directly negate Gemini's claim that there is insufficient competition for broadband services and that the Telco, along with cable companies, exercise too much power in this market. In the opinion of the Telco, Gemini's argument directly contradicts the FCC's findings that the broadband market is not only competitive but that cable modems dominate the broadband market. The Telco states that the FCC has, with one exception, refused to unbundle the HFPL, packet switching functionalities/bandwidth and FTTH loops because the broadband market is already competitive and that less regulation and unbundling will further the Telcom Act's and FCC's goals to spur the deployment of advanced telecommunications service capabilities.

The Telco also states that the FCC has found that ILECs are only required to make available unbundled access to 2-wire and 4-wire copper analog voice-grade loops (and to condition such loops) upon request by a CLEC for the deployment of xDSL-based services, along with the ILEC's traditional TDM-based loops such as DS1s and DS3s, even where the ILEC has already deployed an overbuild hybrid network. Finally, because the market for broadband service is highly competitive, the FCC has held that carriers cannot be impaired without access to ILEC facilities, as a matter of federal law.[41]

Lastly, the Telco maintains that the FCC confirmed that the Department can only order unbundling of a network element that is actually part of an incumbent's network.

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[39] Id., pp 5-9
[40] Id., pp. 9-11
[41] Id., pp. 11-13

Therefore, the Department may only require the Telco to unbundle facilities in its network which constitute "network elements," (i.e., those elements that are a part of the Telco's network). The Telco reiterates that its remaining coaxial distribution facilities are not part of the Telco's network and thus cannot be required to be unbundled.[42]

C. OFFICE OF CONSUMER COUNSEL

The OCC argues that the Telco's HFC facilities constitute UNEs and as such must be tariffed and offered on an element by element basis for lease at TSLRIC pricing. The OCC notes that I-SNET included statewide outside plant modernization utilizing HFC and switch upgrades. According to the OCC, I-SNET was described as a full service network that could provide a full suite of voice, data and video services. The OCC also claims that the stated goal of that network rebuild was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. Therefore, the OCC concludes that the HFC network was planned and designed to directly serve both telephony voice customers and to provide transport for video services.

Additionally, the OCC contends that the Department has been consistently forthright that the Telco consider itself "encouraged" if not legally bound to fully utilize this plant rather than merely storing it for an unspecified future use. The OCC cites to the SPV Relinquishment Decision,[43] where the Department held that should the Telco not lease the HFC network elements, "aggrieved" competitors should initiate a docket such as this to resolve the issue.

The OCC maintains that this docket requires the Department to determine, pursuant to state law, that the HFC network elements are subject to unbundling, (i.e., whether the Telco has an obligation as an ILEC to make existing facilities available to competitors in a nondiscriminatory manner). While noting the Department's responsibility to resolve whether the HFC network is subject to unbundling pursuant to Conn. Gen. Stat. §16-247b(a), the OCC states that such a determination will initiate an inquiry governed by federal law promulgated under 47 U.S.C. § 252. According to the OCC, the FCC has adopted rules and policies designed to make UNEs available to authorized telecommunications carriers such as Gemini with extensive rules concerning good faith negotiating conduct, non-discrimination, and freedom for the lessee to combine as they see fit. Accordingly, the OCC argues that the Telco must lease UNEs at TSLRIC prices.

The OCC disagrees with the Telco that the HFC network is not subject to unbundling because it is not currently used for telecommunications services. In the opinion of the OCC, it is the capability of a network that determines whether it is subject to treatment as a UNE. Further, numerous court cases support this conclusion, highlighting the opportunity for an ILEC to avoid the legal requirement of the unbundling

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[42] Id., pp. 13-15

[43] Docket No 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc to Relinquish SNET Personal Vision, Inc's Certificate of Public Convenience and Necessity, Decision, dated March 14, 2001 (Relinquishment Decision)

and leasing of network elements by simply taking certain equipment out of service or discontinuing a specific service. The OCC argues that the inquiry in this proceeding must determine whether the facilities can be used by a potential competitor to provide telephone service to consumers, not the current use of them by the ILEC.

The OCC also disagrees with the Telco claim that the HFC network was only used for cable television services, is not a telecommunications network and thus is not capable of being unbundled. The OCC notes that the HFC network was designed to replace the existing twisted-pair copper telecommunications network, coincidentally providing the Telco with the possibility of delivering cable television services. The ancillary use of the HFC network by the Telco's cable television subsidiary, cannot be used to prevent unbundling of telecommunications facilities.[44]

Moreover, the HFC network represents a unique opportunity for sharing infrastructure to mutual advantage for the benefit of consumers. The OCC argues that for the Department to issue a ruling that portions of the Telco's HFC plant constitute UNEs, it will need to know what HFC plant currently exists, the component elements of that plant, how the plant is capable of being used, and how it constitutes a UNE. According to the OCC, the Telco has been less than forthcoming in providing that information and that the Company is in a superior position to know the current status of the HFC network in terms of inventory and capacity.

Of greater concern to the OCC however, is the Telco's claim that it has no records and no way of determining, other than a manual audit of the system, what elements of the HFC network plant remain and the condition or operability of that infrastructure. As a public service company, the Telco has an obligation to maintain adequate plant records and inventories. In the opinion of the OCC, it is incumbent upon the Department to hold the Telco responsible for its failure to adequately maintain records of existing plant. Accordingly, the OCC recommends that the Department establish a reasonable audit schedule to commence immediately, at the Telco's expense, should the Company continue to insist that it lacks precise knowledge or records detailing existing plant.[45]

In comments filed in response to the Reopened Notice, the OCC states that the intent of the TRO is to promote unbundling of legacy facilities/services while achieving limited unbundling of next-generation elements to promote future investments in broadband. The result is that the Department is presented with the opportunity to unbundle a unique HFC network built and currently owned by an ILEC.

The OCC claims that the TRO compels ILECs to continue to provide unbundled access to a voice grade equivalent channel and high-capacity loops using TDM technology features, functions, and capabilities of their hybrid loops, including DS1 and DS3. This requirement forms a central feature of the FCC's overall public policy resulting from its examination of mass markets loop access and differentiated among copper loops, hybrid loops, and FTTH loops, particularly in terms of the types of services offered over these facilities. This policy provides CLECs with the opportunity to

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[44] OCC Brief, pp 2-7

[45] Id., pp 8-13

continue providing both traditional narrowband services as well as high-capacity services like DS1 and DS3 circuits

The OCC also claims that the TRO's public policies will be fulfilled by continuing the unbundling of legacy copper and hybrid loop facilities for narrowband functions, coupled with the more limited unbundling of next-generation fiber-based networks, in an attempt to encourage investment in these new networks. In addition to requiring unbundling for narrowband service with hybrid loops, unbundling of the Telco's HFC network for the narrowband uses will not deter the deployment of additional broadband in this state. The OCC states that releasing the Telco from the requirement that it unbundle its HFC network will not spur the Company to upgrade that network for broadband use. Rather, unbundling the Telco's HFC network will force further investment by the Company and others since Gemini has already demonstrated the will and ability to build an innovative network.

Further, the OCC is not convinced that intermodal competition is a worthy goal for introducing competition in the telecommunications market since thus far it has only displayed the qualities of an economic duopoly. The Petition provides an approach to advancing competition by upgrading a new platform in the architecture of telecommunications in this state.

The OCC concludes that the FCC has determined that distinguishing between "legacy" technology and "newer" technology, rather than transmission speeds, bandwidth, or some other factor, is practical because the technical characteristics of packet-switched equipment versus TDM-based equipment are well known and understood in the industry. That policy clearly dictates that the Telco's HFC network is a UNE that the OCC urges the Department order be unbundled.[46] While noting the number of legal challenges to the TRO, the OCC maintains that narrowband use of an abandoned hybrid network, remains required by law whether the TRO stands, is stayed, or is ultimately rejected by the courts.[47]

The OCC also maintains that the TRO requires that, with regard to narrowband service, legacy loops consisting of all copper and also hybrid copper/fiber facilities (such as the Telco's HFC network) must continue to be provided on an unbundled basis for the provision of narrowband services. The OCC asserts that the TRO specifically requires ILECs to continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. This policy provides CLECs with the opportunity to continue providing both traditional narrowband services and high-capacity services like DS1 and DS3 circuits

Moreover, the OCC argues that the fiber elements of the HFC network have already been integrated into the trunking services the Telco provides itself and possibly leases to other providers. While noting the Telco claim that its HFC network was not used to provide telecommunications and not subject to unbundling, the OCC contends that the record demonstrates that telecommunications was the primary goal and use of the HFC network. In short, the HFC network provided narrowband (and possibly

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[46] OCC September 12, 2003 Written Comments, pp 4-8

[47] Id , p 10

broadband) loop service for the Telco as an integral element of the public switched telephone network and, to the extent it has survived, it is still capable of doing so. The OCC concludes that the Telco's HFC network is a UNE that must be leased to competitors on a non-discriminatory basis and subject to TSLRIC-based pricing pursuant to the TRO and existing state law.[48]

The OCC also states that performing the revised impairment analysis outlined in the TRO leads to the conclusion that Gemini would be impaired by lack of access to the HFC network. Therefore, the OCC recommends that the Department require that the network be unbundled under state law, with the additional support of the provisions of the TRO. In support of that recommendation, the OCC suggests that Gemini is "impaired" when lack of access to an ILEC network element poses a barrier to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic.

Additionally, the OCC states that the FCC determined that CLECs are impaired on a national basis without unbundled access to a transmission path when seeking to provide service to the mass market, although it also found as a policy matter that this impairment "at least partially diminishes with the increasing deployment of fiber." The OCC claims that the TRO defines operational and economic barriers as scale economies, sunk costs, first-mover advantages, and barriers within the control of the ILEC, specifically analyzing market-specific variations, including considerations of customer class, geography, and service.

Further, the OCC notes that the FCC has evaluated three primary factors to determine the most appropriate unbundling requirements for hybrid loops: (1) the cost of unbundling balanced against the statutory goals set forth in §706 of the Telcom Act; (2) the effect of available alternatives; and (3) the state of intermodal competition. The OCC suggests that the Department rely on an impairment analysis in this proceeding in terms of state and federal law. According to the OCC, Gemini is relying on state law to leverage a financially-beneficial access method (unbundled network elements) to utilize newer technologies or a better network architecture in order to produce additional revenue opportunities that should accrue from enhanced economies of scope. The OCC argues that Gemini has a legal right to access to the HFC network and that denial of that access constitutes impairment not permitted by law.[49]

Lastly, the OCC claims that the FCC has prohibited ILECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs provided to CLECs. Specifically, any ILEC practice, policy or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited under §251(c)(3) of the Telcom Act to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions. The OCC states that while this provision may not have ex post facto effect which would require the rebuilding of the HFC network, it

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[48] Id., pp 13-15

[49] Id., pp 15-18

may operate as a stay on the continued destruction of the HFC network elements remaining in the Telco's plant and subject to this proceeding.[50]

D. Office of the Attorney General

The AG recommends that the Department reject the Telco's arguments that: (1) Gemini's petition is preempted under federal law; (2) the Department has no jurisdiction over the coaxial distribution facilities in Tier Three as they were not and are not used to provide telecommunications services and, therefore, are not subject to unbundling pursuant to § 251(c)(3) of the Telcom Act, Conn. Gen. Stat. § 247b(a), or any other federal or state law. The AG suggests that these arguments be rejected because the Petition is not preempted under federal law. To the contrary, the Telcom Act specifically provides that state regulatory commissions may impose access or interconnection obligations in addition to those imposed under federal law or by the FCC. According to the AG, the relevant inquiry is not whether the HFC plant was used to provide telecommunications services, but whether the plant is capable of being used for telecommunications services. Finally, the AG argues that Gemini is not required to demonstrate that it would be impaired without access to the HFC plant because it is incorrect and would undermine the broad pro-competitive policies of the Telcom Act as well as Connecticut state statutes.[51]

The AG states that the Telco's first argument that federal law preempts state regulatory agencies from determining what category of network elements must be unbundled is incorrect because the Supreme Court has made clear that preemption analysis must begin with the presumption that Congress did not intend to supplant state law. It is also clear that the presumption against preemption must be applied not only to decide whether Congress intended federal legislation to have preemptive effect, but also the actual scope of any preemptive effect.

The AG maintains that the Department is not preempted under federal law from exercising its regulatory authority to unbundle network elements necessary for the provision of telecommunications services. The Telcom Act specifically provides that the FCC shall not proscribe or enforce any regulation that would preclude or preempt any order of a state commission establishing access or interconnections obligations of the ILEC. Contrary to the Telco's arguments, the Telcom Act states that the FCC shall not displace or preempt the Department's authority to impose interconnection or access requirements. In the opinion of the AG, the Department's unbundling of the Telco's HFC plant does not conflict with or frustrate the FCC regulations; rather, it promotes the policies underlying those regulations. Accordingly, the Telco's arguments that the Department's authority to unbundled network elements is preempted by federal law are without merit.[52]

Regarding the Telco's argument that the Department has no jurisdiction over the coaxial distribution facilities in Tier Three because they were not used to provide telecommunications services and not subject to unbundling, or any other federal or state

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[50] Id., pp 18 and 19

[51] AG Brief, pp 2 and 3

[52] Id., pp. 3-5

law, the AG maintains that this argument is without merit and has been rejected by the FCC as well as by trial and appellate courts throughout the country. According to the AG, the relevant inquiry is not whether the plant was used to provide telecommunications services, but whether the plant is capable of being used for telecommunications services. The AG asserts that the FCC specifically found that unused telecommunications plant was a network element subject to unbundling. Therefore, the AG recommends that the Department reject the Telco's arguments that the plant must be in use to be unbundled and tariffed. As the HFC plant is capable of being used for the provision of telecommunications services, the Telco must provide access to it in a nondiscriminatory manner.[53]

Lastly, the AG recommends that the Department reject the Telco's claim that Gemini must make a preliminary showing that each network element is necessary for its provision of each telecommunications service and that Gemini will be impaired in its provision of those services without access to each network element. The AG contends that the Telco's argument is an incorrect statement of the law and irrelevant to the issue of whether the Company must make its plant available as UNEs to all telecommunications providers on a nondiscriminatory basis. The AG claims that the Telco is wrong that Gemini must first demonstrate that the fiber is necessary for the provision of telecommunications services before the Company provides a description of the plant sought to be unbundled. Therefore, the AG recommends that the Department find that the Telco's HFC plant is subject to unbundling and tariffing as an UNE pursuant to Conn. Gen. Stat. § 16-247b(a) and order the Company to unbundle its HFC network and move to the pricing phase of this proceeding.[54]

IV. DEPARTMENT ANALYSIS

A. Introduction

Gemini has requested the Department issue a Declaratory Ruling finding that certain HFC facilities owned by the Telco constitute UNEs and as such, must be tariffed and offered on an element by element basis at TSLRIC pricing. As indicated above, this proceeding has been bifurcated to address the legal issues. However, before addressing those issues, a discussion of the Telco's I-SNET technology plan, which included the statewide modernization of its outside plant utilizing the HFC technology and switch upgrades, is appropriate.

B. HFC Network History

On December 29, 1994, as revised on April 11, 1995, the Telco filed its I-SNET Technology Plan with the Department. The intent of I-SNET was to be a full service network that could provide a full suite of voice, data and video services.[55] The goal of I-

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[53] Id., pp 5-7.

[54] Id , pp 7 and 8

[55] In Docket No. 99-04-02, Application of SNET Personal Vision, Inc to Modify its Franchise Agreement, the Southern New England Telecommunications Corporation (SNET) testified that it anticipated significant opportunities for efficiencies in terms of operation, maintenance and ability to quickly provide telecommunications services to customers. SNET also testified that I-SNET was "proved-in"